U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 18 July 2007In the Matter of

J. V. M.
Claimant

Case No. 2006-BLA-06133

v.

PIKEVILLE COAL CO.
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

APPEARANCES:[1]
Joseph Wolfe, Esquire
Claimant
Lois A. Kitts, Esquire
For the Employer

BEFORE: DANIEL F. SOLOMON
Administrative Law Judge

DECISION AND ORDER

AWARD OF BENEFITS

This proceeding arises from a request for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. In accordance with the Act and the pertinent regulations, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing requested by the Employer June 20, 2006. Director's Exhibit ("DX") 33.

Claimant was last employed in coal mine work in the state of Kentucky, the law of the United States Court of Appeals for the Sixth Circuit controls. See ***Shupe v. Director***, OWCP, 12 BLR 1-200, 1-202 (1989)(en banc). Since Claimant filed this application for benefits after January 1, 1982, Part 718 applies.

Claimant filed an initial claim August 30, 2002 (DX 1). He alleged he last worked for Employer in Phelps, Kentucky. Although the Claimant established that he had

[1] The Director, Office of Workers' Compensation Programs, was not present nor represented by counsel at the hearing.

pneumoconiosis and that it was caused by pneumoconiosis, he failed to show that he had a total respiratory disability or that any disability was due to pneumoconiosis. He did not appeal to the hearing level. Id.

The Claimant's current application is a subsequent claim (formerly known as a "duplicate" claim), filed on November 4, 2005 (DX 3). The District Director issued the Notice of Claim on November 9, 2005, naming Pikeville Coal Company, self-insured through Pikeville Coal Company and Underwriters Safety & Claims, as the potentially liable operator. (DX 17). The Operator responded and contested the claim. (DX 17, DX 18). On March 9, 2006, the District Director completed a Schedule for Submission of Additional Evidence with a preliminary decision of entitlement. (DX 24). Counsel for the employer filed an Operator Response with Special Objections on March 24, 2006. (DX 25).

Following further development of the claim the District Director issued a Proposed Decision and Order Award of Benefits on June 13, 2006. (DX 32). The Director found that the evidence shows that the claimant contracted pneumoconiosis and that the disease has caused a breathing impairment of sufficient degree to establish total disability, within the meaning of the Act and the Regulations; and that Pikeville Coal Company is the coal mine operator designated as responsible for payment of benefits due the claimant. The Employer requested a formal hearing before the Office of Administrative Law Judges. (DX 33). On September 6, 2006, the case was sent to the Office of the Administrative Law Judges. (DX 38).

The case was heard on March 14, 2007, in Pikeville, Kentucky. Forty (40) Director's Exhibits (DX 1- DX 40) were admitted into evidence for identification.

The Claimant was the only witness. He testified wearing an oxygen tank. TR 8. He stated that he was 69 years old, he had been a roof bolter and pinner, from 1974 to 1994 in coal mine employment. Id 8,10-11. He worked in both low and high coal. Id. He also worked as a shoveler. He performed heavy work.

He takes three liters of oxygen daily, and has been doing so for about four years. Id. 13. In his opinion, he could not return to mining. Id. 14.

At one time he had been a smoker beginning as a teen-ager, but quit about three and a half years earlier. Id. 12.

The record remained open for further development. On May 21, 2007, a follow-up telephone conference was held. Subsequently, the Claimant submitted five (5) exhibits (marked "CX"1-CX5) and the Employer submitted seven (7) exhibits marked as "EX" 1 – EX 7. I hereby admit these for identification. The parties also submitted Evidence Summary Forms and briefs.

APPLICABLE STANDARDS

Because the Claimant filed this application for benefits after March 31, 1980, the regulations set forth at part 718 apply. ***Saginaw Mining Co. v. Ferda***, 879 F.2d 198, 204, 12 B.L.R. 2-376 (6th Cir. 1989).

To receive black lung disability benefits under the Act, a miner must prove that (1) he suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) he is totally disabled, and (4) his total disability is caused by pneumoconiosis. ***Gee v. W.G. Moore and Sons***, 9 B.L.R. 1-4 (1986) (en banc); ***Baumgartner v. Director, OWCP***, 9 B.L.R. 1-65 (1986) (en banc). See ***Mullins Coal Co., Inc. of Virginia v. Director, OWCP***, 484 U.S. 135, 141, 11 B.L.R. 2-1 (1987). The failure to prove any requisite element precludes a finding of

entitlement. ***Anderson v. Valley Camp of Utah, Inc.***, 12 B.L.R. 1-111 (1989); Perry ***v. Director, OWCP***, 9 B.L.R. 1-1 (1986) 1-1 (1986) (en banc).

STIPULATIONS AND WITHDRAWAL OF ISSUES

1. The Claimant is a "miner" as that term is defined by the Act, and has worked after 1969. TR 6.

3. The Employer agreed that the Claimant had 19 years of coal mine employment. TR 7.

4. Pikeville Coal Company is the responsible operator. TR 7.

After a review of the stipulations and the record, they are accepted.

REMAINING ISSUES

1. Whether the miner suffers from pneumoconiosis.
2. If so, whether the miner's pneumoconiosis arose out of coal mine employment.
3. Whether the miner is totally disabled.
4. Whether the miner's total disability is due to pneumoconiosis.

BURDEN OF PROOF

"Burden of proof," as used in this setting and under the Administrative Procedure Act[2] is that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." "Burden of proof" means burden of persuasion, not merely burden of production. 5 U.S.C. § 556(d).[3] The drafters of the APA used the term "burden of proof" to mean the burden of persuasion. ***Director, OWCP, Department of labor v. Greenwich Collieries [Ondecko]***, 512 U.S. 267, 18 B.L.R. 2A-1 (1994).[4]

A Claimant has the general burden of establishing entitlement and the initial burden of going forward with the evidence. The obligation is to persuade the trier of fact of the truth of a proposition, not simply the burden of production; the obligation to come forward with evidence to support a claim. Therefore, the Claimant cannot rely on the Director to gather evidence. The Claimant bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. ***Oggero v. Director, OWCP***, 7 B.L.R. 1-860 (1985).

Subsequent Claim

20 C.F.R. §725.309 of the revised regulations states, in pertinent part:

(d) If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see

[2] 33 U.S.C. § 919(d) ("[N]otwithstanding any other provisions of this chapter, ant hearing held under this chapter shall be conducted in accordance with [the APA]; 5 U.S.C. § 554(c)(2). Longshore and Harbors Workers' Compensation Act ("LHWCA") 33 U.S.C. § 901-950, is incorporated by reference into Part C of the Black Lung Act pursuant to 30 U.S.C. § 932(a).

[3] The Tenth and Eleventh Circuits held that the burden of persuasion is greater than the burden of production, ***Alabama By-Products Corp. v. Killingsworth***, 733 F.2d 1511, 6 B.L.R. 2-59 (11th Cir. 1984); ***Kaiser Steel Corp. v. Director***, OWCP [Sainz], 748 F.2d 1426, 7 B.L.R. 2-84 (10th Cir. 1984). These cases arose in the context where an interim presumption is triggered, and the burden of proof shifted from a Claimant to an employer/carrier.

[4] Also known as the risk of non-persuasion, *see* 9 J. ***Wigmore, Evidence*** § 2486 (J. Chadbourn rev. 1981).

§725.502(a)), the later claim shall be considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement…has changed since the date upon which the order denying the prior claim became final…The following additional rules shall apply to the adjudication of a subsequent claim:

(1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.

(2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based….

(3) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement.

(4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in the prior claim, except those based on a party's failure to contest an issue (see §725.463), shall be binding on any party in the adjudication of the subsequent claim…

20 C.F.R. §725.309(d)(1)-(4).

TIMELINESS

Timeliness is a jurisdictional matter that can not be waived. 30 U.S.C. § 932(f), provides that "[a]ny claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later": (1) a medical determination of total disability due to pneumoconiosis; or (2) March 1, 1978. The Secretary of Labor's implementing regulations at 20 C.F.R. § 725.308 sets forth in part, as follows:

(a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Act of 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.

(c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, except as provided in paragraph (b) of this section, the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

The Employer argues the claimant stopped working in 1993 and submitted medically supportive evidence in his prior claim that he was totally disabled due to pneumoconiosis from Dr. Glen R. Baker in a 2003 medical report. (DX-01-82). For that reason, the administrative law judge ought to find a "medical determination of total disability due to pneumoconiosis" was communicated to the claimant more than three (3) years after a medical determination satisfying the statutory definition.

The employer contends this is sufficient communication to satisfy the requirement at Section 725.308 (a) that the medical determination be communicated to the miner. ***Tennessee Consolidated Coal Co. v. Kirk***, 264 F.3d 602 (6th Cir. 2001) directs that I "must determine if (the physician) rendered a well-reasoned diagnosis of total disability due to pneumoconiosis such

that his report constitutes a 'medical determination of total disability due to pneumoconiosis which has been communicated to the miner'" under § 725.308 of the regulations. See also ***Bowling v. Whitaker Coal Corp***., BRB Nos. 04-0651 BLA and 04-0651 BLA-A (Apr. 14, 2005) (unpub).

A review of the record shows that Employer has not established that the Claimant knew the consequences of Dr. Baker's's opinion. I find that it was not properly communicated.

Moreover, I must also determine whether the report was well-reasoned. ***Sturgill v. Bell County Coal Corp***., 23 B.L.R. 1-159 (2006) (en banc) (J. McGranery, dissenting) and ***Furgerson v. Jericol Mining, Inc***., BRB Nos. 03-0798 BLA and 03-0798 BLA-A (Sept. 20, 2004) (unpub.), relying on ***Kirk***..

A 'documented' opinion is one that sets forth the clinical findings, observations, facts, and other data upon which the physician based the diagnosis. ***Fields v. Island Creek Coal Co***., 10 B.L.R. 1-19 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's work and social histories. ***Hoffman v. B&G Construction Co.***, 8 B.L.R. 1-65 (1985); ***Hess v. Clinchfield Coal Co***., 7 B.L.R. 1-295 (1984); ***Justus v. Director, OWCP***, 6 B.L.R. 1-1127 (1984). Indeed, a treating physician's opinion based only upon a positive x-ray interpretation and claimant's symptomatology was deemed sufficiently documented. ***Adamson v. Director, OWCP***, 7 B.L.R. 1-229 (1984).

A 'reasoned' opinion is one in which the administrative law judge finds the underlying documentation and data adequate to support the physician's conclusions. ***Fields***, supra. Indeed, whether a medical report is sufficiently documented and reasoned is for the judge as the finder-of-fact to decide. ***Clark v. Karst-Robbins Coal Co.***, 12 B.L.R. 1-149 (1989)(en banc).

I note that at the time, Dr. Baker had determined that the Claimant was totally disabled. However, the Director noted evidence to the contrary. DX 1. I find that the evidence on total disability was at best, at equipoise. The burden is on the Employer to show otherwise and I find that it has failed to do so.

I have reviewed all of the evidence in the record and I find that the proffered evidence does not rebut the presumption.

Medical Evidence
X-ray Interpretations

EX No.	*Physician*	*Quali-fications*	*Date of Study*		*Quality*	*Reading*
DX-12	Rasmussen	B	01/23/2006	01/24/2006	1	1/0[5]
DX-30	Hayes	B/BCR	"	05/16/2006	1	Negative
DX-14	Dahhan	B	4/15/2006	04/15/2006	1	0/0
CX-05	DePonte	B/BCR	2/07/2007	02/09/2007	1	0/1
EX-05	Halbert	B/BCR	"	02/27/2007	1	0/0
EX-03	Rosenberg	B	04-16-07	04-16-07	1	0/0

[5] The x-ray was read for quality purposes only by Peter Barrett, M.D., board certified in radiology and a "B" reader. It was deemed Quality level 1. DX 14.

Ventilatory Function Studies

Exhibit No.	Physician	Date of Study	Tracings Present?	Flow-volume Loop?	Broncho-Dilator?	FEVI	FVC/MVV	Coop and Comp. Noted
CX-01	Stone Mountain Health Services	09/15/2006	Y	Y	N	1.16	2.74	Good
CX-05	Alin Agarwal	02/07/2007	Y	Y	Y	1.00 0.90	2.10 1.96	Good
DX-14	Dahhan	04/15/2006	Y	Y	Y	1.26 1.27	2.54 2.50	Good
EX-01	Rosenberg	04/16/2007	Y	Y	Y	1.09 1.12	2.31/53 2.47/50	Good

Arterial Blood Gases

Exhibit No.	*Physician*	*Date of Study*	*Altitude*	*Resting (R) Exercise (E)*	*PCO2*	*PO2*	*Comments*
DX-12	Rasmussen	01/23/2006	0-2999	R E	37.0 38.0	65.0 52.0	
CX-05	Alin Argarwal	02/07/2007	0-2999	R E	37.6 37.6	75.4 53.9	
EX-01	Rosenberg	04/16/2007	0-2999’	R E	37.7 38.8	80.5 67.7	Normal
DX-14	Dahhan	04/15/2006	0-2999’	R E	35.8 35.7	85.8 91.7	Normal

Medical Opinion Evidence

Donald. L. Rasmussen, M.D.

Dr.Rasmussen is a B-reader and Board-certified internist, who performed the Department of Labor examination on January 23, 2006. 20 years coal mine employment was noted, as was the smoking history. The Claimant reported constant colds, cough and wheezing producing sputum, and complained that he wakens at night from shortness of breath. Testing produced x-ray evidence of pneumoconiosis (1,0), an airflow obstruction, a marked impairment in oxygen transfer during mild exertion, and a markedly reduced SBDLCO. Dr. Rasmussen determined that Claimant does not retain the pulmonary capacity to perform his last regular coal mine job. Clinical pneumoconiosis was diagnosed, but not legal pneumoconiosis. DX 12.

Abdul K. Dahhan, M.D.

Dr. Dahhan, board certified in internal medicine and pulmonology, conducted an examination April 15, 2006 for the Employer. He diagnosed chronic obstructive pulmonary disease (COPD) and opined that Claimant does not retain the respiratory capacity to continue his coal mining job. However, he stated that he was of the opinion that pulmonary disability results from the lengthy smoking history. Dr. Dahhan stated that Claimant’s pulmonary disability was not caused by, hastened, related to, contributed to or aggravated by the inhalation of coal mine dust or coal workers’ pneumoconiosis. DX 14.

Anil Agarwal, M.D.

Dr. Agarwal examined the Claimant on February 7, 2007. He noted cough, expiration, wheezing and shortness of breath. An x-ray taken on that date was read as negative by Dr. Deponte, but it was positive for emphysema. He found that testing revealed a severe obstructive component and mild hypoxemia. Dr. Agarwal diagnosed chronic obstructive pulmonary disease due to a combination of 49 years smoking and coal dust exposure from 19 years of coal mining. The pulmonary impairment is severe and he does not retain the pulmonary capacity to work as a miner or perform an equivalent job. His pulmonary impairment is due to chronic obstructive pulmonary disease. The report does not mention pneumoconiosis. CX 5.

David Rosenberg, M.D.

Dr. Rosenberg, also board certified in internal medicine and pulmonology, conducted an examination for the Employer on April 16, 2007. While he stated that he is disabled from a pulmonary perspective which is caused by smoking related form of COPD. The Claimant does not have pneumoconiosis. CX 1, CX 2.

Note

A report and deposition of Dr. Gregory Fino, M.D. was not marked as an exhibit and not entered into evidence and will not be considered in this decision.

Hospitalization Records and Treatment Notes

Exhibit No.	*Beginning and Ending Dates of Hospitalization/ Treatment*	*Name of Hospital/Physician*	*Nature of Treatment*
CX-02	11/11/2003 11/11/2004 02/24/2005 08/24/2005	Lincare	Prescription renewal for active oxygen Oxygen prescription Report of oximetry
CX-03	02/04/2004	Dr. Stephanie Baker	Certificate of the medical necessity of oxygen
CX-4	12/23/2003-08/28/2006	Nicholas Apothecary	Pharmaceutical Records

FINDINGS OF FACT

Total Disability

To receive black lung disability benefits under the Act, a claimant must establish total disability due to a respiratory impairment or pulmonary disease. If a coal miner suffers from complicated pneumoconiosis, there is an irrebuttable presumption of total disability. 20 C.F.R. §§ 718.204(b) and 718.304. If that presumption does not apply, then according to the provisions of 20 C.F.R. §§ 718.204(b)(1) and (2), in the absence of contrary evidence, total disability in a living miner's claim may be established by four methods: (i) pulmonary function tests; (ii) arterial blood-gas tests; (iii) a showing of cor pulmonale with right-sided, congestive heart failure; or (iv) a reasoned medical opinion demonstrating a coal miner, due to his pulmonary condition, is unable to return to his usual coal mine employment or engage in similar employment in the immediate area requiring similar skills.

Both Drs. Agawal and Dr. Rasmussen determined that the Claimant is totally disabled from a respiratory impairment. Dr. Dahhan and Dr. Rosenberg also determined that the Claimant

is totally disabled from a respiratory impairment, but they concluded that it was due to cigarette smoking.

The record does not contain sufficient evidence that Claimant has complicated pneumoconiosis and there is no evidence of cor pulmonale with right sided congestive heart failure. As a result, the Claimant must demonstrate total respiratory or pulmonary disability through pulmonary function tests, arterial blood-gas tests, or medical opinion.

All of the medical reports accept and the record shows that Claimant has established total respiratory disability. All of the physicians who have performed pulmonary examinations of the claimant in conjunction with the present claim; i.e., DX 12, DX 14, CX 1, and EX 1 and EX 2, determined that the Claimant has established total respiratory disability (although Drs. Rosenberg and Dahhan do not agree with Dr. Rasmussen that the disability is due to pneumoconiosis).

After a review of the evidence, I accept that the Claimant has established total disability.

Existence of Pneumoconiosis

Pneumoconiosis is defined as a chronic dust disease arising out of coal mine employment.[6] The regulatory definitions include both clinical (medical) pneumoconiosis, defined as diseases recognized by the medical community as pneumoconiosis, and legal pneumoconiosis, defined as any chronic lung disease. . .arising out of coal mine employment.[7] The regulation further indicates that a lung disease arising out of coal mine employment includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b). As several courts have noted, the legal definition of pneumoconiosis is much broader than medical pneumoconiosis. ***Kline v. Director, OWCP***, 877 F.2d 1175 (3d Cir. 1989).

A living miner can demonstrate the presence of pneumoconiosis by: (1) chest x-rays interpreted as positive for the disease (§ 718.202(a)(1)); or (2) biopsy report (§ 718.202(a)(2)); or the presumptions described in Sections 718.304, 718.305, or 718.306, if found to be applicable; or (4) a reasoned medical opinion which concluded the disease is present, if the opinion is based on objective medical evidence such as blood-gas studies, pulmonary function tests, physical examinations, and medical and work histories. (§ 718.202(a)(4)).

X-ray Evidence

In this case, there are six readings of four x-rays identified by the parties. The Employer offers the April 15, 2006, February 7, 2007 and April 16, 2007 x-rays as unequivocal evidence that rejects a finding of pneumoconiosis. The initial x-ray readings are in conflict. "[W]here two or more X-ray reports are in conflict…consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." 718.202(a)(1). I am "not required to defer to…radiological experience or…status as a professor of radiology." ***Dempsey v. Sewell Coal Co***., 23 BLR 1-47 (2004).

I note that while Dr. Rasmussen is a "B" reader, he is not dually qualified. Dr. Hayes read the same x-ray as negative, and he is dually qualified and is thus better qualified.

Moreover of the six readings, five are read as negative. The Board has held that I am not required to defer to the numerical superiority of x-ray evidence, ***Wilt v. Wolverine Mining Co***., 14 B.L.R. 1-70 (1990), although it is within my discretion to do so, ***Edmiston v. F & R Coal Co***., 14 B.L.R. 1-65 (1990). See also ***Schetroma v. Director, OWCP***, 18 B.L.R. 1- (1993) (use of

[6] 20 C.F.R § 718.201(a).

[7] 20 C.F.R. § 718.201(a)(1) and (2) (emphasis added).

numerical superiority upheld in weighing blood gas studies); ***Tokaricik v. Consolidation Coal Co***., 6 B.L.R. 1-666 (1984) (the judge properly assigned greater weight to the positive x-ray evidence of record, notwithstanding the fact that the majority of x-ray interpretations in the record, including all of the B-reader reports, were negative for existence of the disease). See also ***Woodward v. Director, OWCP***, 991 F.2d 314 (6th Cir. 1993).

I also note that the more recent readings are all negative.[8] Because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates newer evidence from that evidence which is older. ***Clark v. Karst-;Robbins Coal Co***., 12 B.L.R. 1-;149 (1989)(en banc); ***Casella v. Kaiser Steel Corp***., 9 B.L.R. 1-;131 (1986).

After a review of the x-ray evidence, I find that that the best qualified readers, the more numerous readings and the most recent evidence substantiate the negative readings.

The Claimant has a burden to prove the existence of pneumoconiosis by a preponderance of the evidence. ***Director, OWCP, Department of labor v. Greenwich Collieries [Ondecko], supra.*** I find that pneumoconiosis has not been established by x-ray.

Biopsy and Presumption

Claimant has not established pneumoconiosis by the provisions of subsection 718.202(a)(2) since no biopsy evidence has been submitted into evidence. The presumptions do not apply.

Medical Reports

20 C.F.R. § 718.202(a)(4) sets forth:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in Section 718.201. Any such finding shall be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

"Legal pneumoconiosis is a much broader category of disease" than medical pneumoconiosis, which is "a particular disease of the lung generally characterized by certain opacities appearing on a chest x-ray." ***Island Creek Coal Co. v. Compton***, 211 F.3d 203 at 210 (4th Cir. 2000). The burden is on the Claimant to prove that his coal-mine employment caused his lung disease. 20 C.F.R. § 718.201(a)(2). A disease "arising out of coal mine employment" is one that is significantly related to, or substantially aggravated by, coal dust exposure. 20 C.F.R. § 718.201(b). ***Cornett v. Benham Coal, Inc***., 227 F.3d 569, 576 (6th Cir. 2000).

The Claimant relies on the opinions of Drs. Agarwal and Rasmussen in an attempt to show that the Claimant has legal pneumoconiosis. Dr. Agarwal noted that Claimant had frequent colds and had cough that produced sputum over a twenty year period with wheezing and

[8] Dr. DePonte found "s/s opacities of 0/1 profusion in all lung zones, consistent with pneumoconiosis." CX 5. The Claimant argues that this is a positive reading. I find it is not. An x-ray which is interpreted as Category 0 (--/0, 0/0, 0/1) demonstrates, at most, only a negligible presence of the disease and will not support a finding of pneumoconiosis under the Act or regulations. Category 1 denotes small opacities definitely present but few in number. The "0" shows that small opacities are absent or less profuse than in category 1. At best, the opinion is equivocal. An opinion may be given little weight if it is equivocal or vague. *Island Creek Coal Co. v. Holdman*, 202 F.3d 873 (6th Cir. 2000).

shortness of breath. On testing, he found severe obstructive airway disease and hypoxemia. The smoking is noted. These may, indeed, be elements of legal pneumoconiosis. Legal pneumoconiosis is a much broader category of disease than medical pneumoconiosis, which is a particular disease of the lung generally characterized by certain opacities appearing on a chest x-ray. ***Crockett Colleries, Inc. v. Barrett***, *supra*.

However, neither Dr. Agarwal nor Dr. Rasmussen addressed legal pneumoconiosis. I also note that the Claimant asks me to give greater weight to opinions from treating physicians, without identifying who the treating physician may be. The Claimant argues that records from Drs. Emory Robinette and J.P. Sutherland dating back to 1980 evidencing x-ray readings are positive for coal worker's pneumoconiosis. "It is therefore, the firm position of the Claimant that he has tendered substantial and probative medical data that proves by a preponderance of the existence his condition of coal worker's pneumoconiosis." Unfortunately, these are not designated as medical reports and I find that the more recent evidence is more probative.

Therefore, I can not find that the Claimant has furnished a reasoned medical opinion to establish pneumoconiosis in absence of x-ray evidence. 20 C.F.R. § 718.202(a)(4).

CAUSATION

Because the Claimant failed to establish pneumoconiosis, I can not find that the miner's pneumoconiosis arose at least in part out of coal mine employment.

TOTAL DISABILITY DUE TO PNEUMOCONIOSIS

Claimant needs to establish that pneumoconiosis is a "substantially contributing cause" to his disability. As he failed to establish pneumoconiosis, I can not find that pneumoconiosis was a substantial contributing cause to the miner's disability. 20 C.F.R. §718.204(c)(1).

CONCLUSION

In summary, although the Claimant has established total disability, he has established a change in condition since his last adjudication. 20 C.F.R. §725.309(d)(1)-(4).

However, Claimant has failed to establish the presence of pneumoconiosis in this claim. Because the Claimant has failed to establish an essential condition of entitlement in this claim, he can not prevail. ***Oggero v. Director, OWCP***, *supra*.

ORDER

The claim for benefits filed by **J.V.M.** is hereby **DENIED**.

A

DANIEL F. SOLOMON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision

is filed with the district director's office. See 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. See 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. See 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).